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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT LARRY PETRO,

Defendant and Appellant.

B211577

(Los Angeles County
Super. Ct. No. KA082748)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed as modified.

Stephen Borgo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie C. Brenan and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Vincent Larry Petro was convicted by jury of assault with a deadly weapon, with an enhancement of great bodily injury. The trial court sentenced him to the low term of two years for the assault with a three-year enhancement, for a total of five years. Appellant contends that the trial court abused its discretion in denying his request to be sentenced to probation. We disagree and therefore affirm.

BACKGROUND

Kimberly Cruz (“Cruz”), the victim of the assault, was in an auto accident a few weeks prior to the assault that resulted in Appellant’s conviction. She was seriously injured in the auto accident, with a fractured nose, fractured cheekbone, and a tear in her left knee. She was unable to walk or care for herself and used a walker to move around her apartment. She asked a family friend, Tina Petro (“Ms. Petro”), who is Appellant’s mother, to move in with her to help her during her recovery.

Shortly after moving in, Ms. Petro asked Cruz if Appellant could move in as well because he was sick and had nowhere to stay. Cruz knew Appellant and knew that he had been diagnosed with schizophrenia, so she agreed, “returning [the] favor” of Ms. Petro’s help.

Although the arrangement worked for a few days, Cruz stated that Appellant began acting strangely by, for example, spitting on the floor and leaving the water on in the bathroom. Because of her own illness, Appellant’s behavior was difficult for Cruz, so she became “nervous” and “agitated at him” and asked him to leave.

On the day of the assault, Appellant was having an argument with his brother, and Cruz became involved. Cruz and Appellant were standing near the doorway to Cruz’s bedroom and began to argue. Cruz explained that Appellant “started calling me the devil. I started calling him the devil. I knew I kind of provoked him. I scared him. I was able to tell.”

As Cruz was “screaming” at Appellant, Appellant hit Cruz in the neck with a crowbar. Appellant threatened to kill Cruz, but Cruz stated that she did not take it seriously because she was aware of his illness and had seen him become angry and agitated at himself before. After hitting Cruz, Appellant dropped the crowbar and ran away. Cruz fell to the floor.

Ms. Petro was in the room helping Appellant pack his belongings. Cruz called Ms. Petro for help, so she came and saw that Cruz was bleeding from the back of her neck. Cruz called 911, and police officers came. The police called paramedics because Cruz was bleeding profusely.

Cruz was hospitalized for several days with a fractured vertebra. She was placed in a “cervical collar,” which she wore for several weeks, in order to immobilize her neck so as to prevent further damage. Cruz’s doctor testified that Cruz had tingling and numbness in her hands because of the fracture of a vertebra in her neck.

Appellant testified at his trial that he did not remember what happened. He did not remember hitting Cruz with the pry bar, and he explained that he was not receiving the proper medication at the time of the incident.

Appellant was charged by information with one count of assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1), with the further allegation of great bodily injury, pursuant to Penal Code section 12022.7, subdivision (a). Although the information initially alleged great bodily injury pursuant to subdivision (b), the prosecutor amended the allegation to allege the lesser allegation found in subdivision (a). The jury found Appellant guilty as to the assault charge and found true the enhancement of great bodily injury.

Appellant filed a sentencing memorandum, asking that the court sentence him to probation, pursuant to California Rules of Court, rule 4.414. Appellant included with his memorandum a report by the United States Department of Justice, entitled “Mental Health Problems of Prison and Jail Inmates.” Appellant also attached a psychological

assessment by a clinical psychologist who had evaluated Appellant following his conviction.

Ms. Petro and Cruz spoke on Appellant's behalf at his sentencing hearing. Appellant's mother explained that she had been trying to obtain psychiatric help for Appellant since he was 17 years old and asked the court to place Appellant somewhere that he could have access to counseling and medical help. Cruz stated that she did not want Appellant to serve any time in prison because he needed to be hospitalized for psychiatric care. She repeatedly stated that Appellant did not deserve to be imprisoned but needed to be hospitalized so that he could obtain help.

The trial court stated that it had taken their comments and Appellant's sentencing memorandum into consideration in determining the sentence. In imposing sentence, the court explained that, because of the great bodily injury allegation, there was a presumptive state prison sentence. The presumption was rebuttable by a showing that this was an unusual case, which would allow probation to be imposed. The court further reasoned as follows:

The criteria that I've heard from both sides do reflect certainly mitigating evidence on behalf of Mr. Petro given his mental health condition. I'm concerned, however, with the fact that it was a preexisting condition and it did not suddenly appear on the date of the incident. Mr. Petro evidently, per family members even during impact statements, has been suffering from this condition for quite some time prior to the incident, on medication and so forth and receiving counseling and didn't have an impact upon Mr. Petro and his ability to control his anger. It certainly clearly did not. He attacked the very vulnerable victim who is doing nothing other than assisting the family, including Mr. Petro's family, after the victim was hurt and immobilized as a result of swinging this pry bar and striking her in the head, causing some damage to even a vertebrae [*sic*].

Mr. Petro didn't stay to tend to this individual or to seek assistance. Instead he fled as typically you would expect of a person who is well aware of their criminal conduct and that there were consequences at risk if you stayed around. Mr. Petro took advantage of that, and he fled the location. . . . This conduct, this incident, despite issues of mental health, shows definitely a danger to the community and to parties that Mr. Petro has interaction with.

For these reasons, I don't think the ineligibility for probation has been overcome in terms of the court being able to impose a probationary sentence. I just don't think it's there. But it certainly is a very compelling mitigating circumstance which will warrant, and the court certainly will impose, low term state prison.

Defense counsel then asked the court to clarify whether a presumption in favor of state prison was required for simple assault, pursuant to Penal Code section 1203.075. The trial court responded that, even if there were no presumption, probation would not be appropriate for the reasons given, but that Appellant's mental health was a mitigating factor, supporting the imposition of the low term. The court therefore imposed a sentence of two years, with a three-year consecutive sentence for the special allegation, resulting in a total sentence of five years in state prison. (See Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).) The court further imposed a \$200 victim restitution fine, a \$200 probation revocation fee, a \$20 court security fee, and "restitution to the victim in any amount determined." The court retained jurisdiction to assess the amount of any restitution.

DISCUSSION

Appellant contends that the trial court abused its discretion in declining his request to be sentenced to probation. Respondent asks that the abstract of judgment be modified to reflect the victim restitution ordered by the trial court at sentencing. We conclude that the trial court did not abuse its discretion in rejecting Appellant's request to be sentenced to probation. We will modify the judgment to reflect the oral pronouncement of the trial court and affirm the judgment in all other respects.

I. Denial of Probation

A. General Principles

Penal Code section 1203, subdivision (e) provides in part that, "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted

probation, probation shall not be granted to . . . [¶] [a]ny person who willfully inflicted great bodily injury . . . in the perpetration of the crime of which he or she has been convicted.” Thus, because of the great bodily injury enhancement, Appellant was presumptively ineligible for probation. “In determining whether the statutory limitation on probation has been overcome, the court is required to use the criteria set forth in California Rules of Court, rule 4.413.” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 830.)

Rule 4.413 sets forth facts that “may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate.” (Cal. Rules of Court, rule 4.413(c).) The rule provides that one fact “not amounting to a defense, but reducing the defendant’s culpability for the offense” includes that “[t]he crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation.” (Cal. Rules of Court, rule 4.413(c)(2)(B).)

“If a court determines the presumption against probation is overcome, it evaluates whether or not to grant probation pursuant to California Rules of Court, rule 4.414. However, ‘mere suitability for probation does not overcome the presumptive bar. . . . [I]f the statutory limitations on probation are to have any substantial scope and effect, “unusual cases” and “interests of justice” must be narrowly construed,’ and rule 4.413 ‘limited to those matters in which the crime is either atypical or the offender’s moral blameworthiness is reduced.’ [Citation.]” (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.) Criteria that affect the decision to grant or deny probation include facts relating to the crime, such as the nature of the crime and the vulnerability of the victim, and facts relating to the defendant, such as the likely effect of imprisonment on the defendant and the likelihood that the defendant would be a danger to others if not imprisoned. (Cal. Rules of Court, rule 4.414.)

B. Trial Court's Analysis

Appellant contends that the trial court's analysis was incorrect because the court failed to first determine whether this was an unusual case under rule 4.413 and instead relied on aggravating and mitigating factors to determine both whether this was an unusual case and whether or not to grant probation. Appellant further contends that the trial court disregarded the evidence that he committed the offense because of his mental illness and that his mental illness made this an unusual case within the meaning of Rule 4.413. Appellant relies, in particular, on the psychological assessment that he submitted.

"The general rule is that a trial court is presumed to have been aware of and followed the applicable law." (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) The defendant has the burden of affirmatively showing that there was error below. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.)

The trial court correctly indicated that Appellant was subject to a presumptive state prison sentence, but that this presumption could be rebutted by a showing that this was an unusual case. The court further reasoned that Appellant's mental health condition constituted mitigating evidence. The court then expressed its concern that Appellant's mental illness was a "preexisting condition" that he had suffered from for a long time, and that, despite having previously received medication and counseling, Appellant still was unable to control his anger. The court cited the vulnerability of the victim, the pry bar that was used to commit the offense, and the harm that Cruz suffered. The court also stated that, despite Appellant's mental health issues, he presented a danger to the community and to parties with whom he interacted.

It appears from the trial court's statements that the court did find that Appellant presented an unusual case because of his mental illness, in keeping with California Rules of Court, rule 4.413. It is true that the court also considered whether Appellant would respond favorably to mental health care treatment, which is a consideration in determining whether this is an unusual case. (Cal. Rules of Court, rule 4.413(c)(2)(B).) However, the court then turned to the inquiry required by Rule 4.414 and examined

criteria that affected its decision to deny probation. The court cited several of the factors listed in Rule 4.414 in deciding to deny probation. For example, the court cited the weapon that was used, the vulnerability of the victim, the physical injury that was inflicted, and the possibility that Appellant would present a danger to others. (*See* Cal. Rules of Court, rule 4.414(a)(2), (3), (4) & (b)(8).)

We cannot agree with Appellant’s argument that the trial court erred in its analysis. Although the trial court did not explicitly state that this was an unusual case for purposes of Rule 4.413, the record does not “affirmatively show[] that there was an error below.” (*People v. Sullivan, supra*, 151 Cal.App.4th at p. 549.) “[A]ny uncertainty in the record must be resolved against the defendant,” (*ibid.*), and the record indicates that the court sufficiently followed the procedure set forth in Rules 4.413 and 4.414.

B. Exercise of Discretion

Appellant also contends that the trial court abused its discretion by disregarding the evidence that Appellant committed the offense because of his mental illness and the evidence regarding the effect that prison would have on him. We disagree.

“‘The standard for reviewing a trial court’s finding that a case may or may not be unusual is abuse of discretion.’ [Citation.] The trial judge’s discretion in determining whether to grant probation is broad. [Citation.]” (*People v. Stuart, supra*, 156 Cal.App.4th at pp. 178-179.) “The trial court also has broad discretion in evaluating the factors in aggravation and mitigation in [determining whether a defendant is suitable for probation]. [Citation.] To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious.” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256-1257.) “‘Abuse of discretion’ . . . depends on whether the trial court’s order ‘exceeds the bounds of reason.’ [Citation.]” (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225.)

The trial court expressed several times its awareness of Appellant’s mental health condition, describing Appellant’s mental illness as a “compelling mitigating circumstance” that warranted imposing the lowest prison term in sentencing Appellant.

Nonetheless, the court found that the other factors, such as the victim's vulnerability and the danger that Appellant might pose to others, counseled against granting probation. The court's reliance on these factors to deny probation cannot be said to "'exceed[] the bounds of reason.'" (*People v. Superior Court (Dorsey)*, *supra*, 50 Cal.App.4th at p. 1225.)

The psychological assessment that Appellant submitted stated that Appellant had "been suffering from a serious mental condition for many years," citing his diagnosis of schizophrenia, his history of psychiatric care, and his need for medication. The psychologist stated that Appellant, unfortunately, had "a history of treatment noncompliance." The assessment concluded that Appellant's "mental and emotional history can be construed as factors in mitigation," and that Appellant's conduct was not "the result of criminality, but due to severe mental and emotional impairment which date to over a decade ago."

Contrary to Appellant's argument, the record does not indicate that the trial court disregarded this evidence. The trial court, consistent with this evaluation, found that Appellant's mental health issues were mitigating factors. The court simply did not find that his mental health issues were sufficiently mitigating to warrant a grant of probation, and the psychological assessment does not necessarily indicate that probation should be granted. The psychological assessment, in fact, supports the trial court's conclusion that Appellant was unable to control his anger and committed the offense despite years of treatment efforts. The record does not indicate that the trial court's decision was arbitrary and capricious.

The trial court did not abuse its discretion in declining Appellant's request to sentence him to probation.

II. Victim Restitution Order

Respondent asks that the abstract of judgment be modified in order to reflect the trial court's oral pronouncement that Appellant was required to make restitution to the victim. At Appellant's sentencing hearing, the trial court ordered that Appellant make

“restitution to the victim in any amount determined.” The restitution order is reflected in the minute order, but not in the abstract of judgment.

““It is . . . important that courts correct errors and omissions in abstracts of judgment.”” (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1328.) Because “the abstract of judgment does not accurately reflect the sentence ordered by the court[,] [w]e direct the trial court to modify the abstract and, as modified, affirm the judgment.” (*People v. Govea* (2009) 175 Cal.App.4th 57, 59; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [explaining that the appellate court has authority to correct errors in the abstract of judgment where the abstract differs from the trial court’s oral judgment].)

DISPOSITION

The clerk of the superior court is directed to modify the judgment to reflect the trial court’s order to make restitution to the victim. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.